



Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20054

RE: In the Matter of Petition for Rulemaking and Declaratory Ruling filed by Craig Cunningham and Craig Moskowitz, CG Docket No. 02-278, CG Docket No. 05-338

Dear Ms. Dortch:

The Mortgage Bankers Association¹ (“MBA”) respectfully submits these reply comments to the Federal Communications Commission (“Commission”) in support of comments filed by the U.S. Chamber of Commerce and U.S. Chamber Institute for Legal Reform² (collectively referred to as “Chamber”) and the American Bankers Association³ on the Petition for Rulemaking and Declaratory Ruling filed by Craig Cunningham and Craig Moskowitz (the “Cunningham-Moskowitz Petition”).⁴

MBA urges the Commission to deny the Cunningham-Moskowitz Petition. This petition seeks to upset the long-settled standard – based on Commission orders – that providing a cell phone number constitutes prior express consent. It does so by requesting that the Commission add a written consent requirement for all calls to cellphones made using an automatic telephone dialing system (“auto-dialer”) or an artificial or prerecorded message. MBA supports the comments offered by the Chamber that amply demonstrate how the TCPA, as currently interpreted, has led to an explosion of lawsuits and how the Cunningham-Moskowitz Petition attempts to overturn decades of understanding that would further enable speculative lawsuits.

MBA also supports the comments of the American Bankers Association that make clear this petition does not warrant consideration by the Commission as it simply rehashes an issue that

¹ The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 280,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation's residential and commercial real estate markets; to expand homeownership and extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of more than 2,200 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, Wall Street conduits, life insurance companies and others in the mortgage lending field. For additional information, visit MBA's Web site: www.mba.org.

² Comment Letter of the U.S. Chamber of Commerce and U.S. Chamber Institute for Legal Reform In the Matter of Petition for Rulemaking and Declaratory Ruling filed by Craig Cunningham and Craig Moskowitz, CG Docket No. 02-278, CG Docket No. 05-338. (March 10, 2017).

³ Comment Letter of the American Bankers Association In the Matter of Petition for Rulemaking and Declaratory Ruling filed by Craig Cunningham and Craig Moskowitz, CG Docket No. 02-278, CG Docket No. 05-338. (March 10, 2017 (March 10, 2017)).

⁴ Public Notice, Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Rulemaking and Declaratory Ruling Regarding Prior Express Consent Under the Telephone Consumer Protection Act of 1991, CG Docket Nos. 02-278 and 05-0338, DA 17-144 (Rel. Feb. 8, 2017).

the Commission has addressed through multiple notice and comment rulemakings. As the American Bankers Association letter notes, these regulations have established a standard of consent that is currently relied upon and deeply embedded in the financial system. In the context of the mortgage servicing business, a change in this interpretation implicates millions of loans that have been originated decades ago with valid consent as understood at the time and repeatedly ratified by the Commission and multiple courts.

Petitioners here are seeking to upend the current regime where borrowers are receiving informational calls on a number *that they have provided* for this purpose. As the Commission has recognized in the past, it strains logic to believe that when one provides a number for informational calls that they do so with the expectation that they will *not* be called on that number.

Additionally, confusion about the scope of the auto-dialer provisions must be resolved before the Commission considers addressing this Petition. This is demonstrated by comments the Commission has received in favor of the Cunningham-Moskowitz Petition:

“I’ve read some of the industry comments submitted in opposition to this petition, including those who claim to be concerned that approval of this petition would “prevent our members from receiving important communications on their mobile phones.” This couldn’t be further from the truth and the solution is so incredibly simple: **call your members with a live person.**”⁵

“Given the TCPA’s requirement that consent to receive robocalls be express, we urge the Commission to clarify that a consumer’s provision of a cell phone number is at most consent *for the business to call that number*, not consent to be called by an auto-dialer or an artificial or prerecorded voice.”⁶

Indeed, as the Commission is aware, the expansive interpretation of auto-dialer outlined in the 2015 Order applies to the capacity of the system used to place the call, not the caller. As such, it can and often does capture live person-to-person communications. These are not “robocalls” as commonly understood.⁷ Rather, as courts have demonstrated, the encompassing auto-dialer definition instead may implicate any informational call made by a business with modern communications systems.⁸

⁵ Comment Letter of Diana Mey In the Matter of Petition for Rulemaking and Declaratory Ruling filed by Craig Cunningham and Craig Moskowitz, CG Docket No. 02-278, CG Docket No. 05-338 (March 10, 2017).

⁶ Comment Letter of the National Consumer Law Center In the Matter of Petition for Rulemaking and Declaratory Ruling filed by Craig Cunningham and Craig Moskowitz, CG Docket No. 02-278, CG Docket No. 05-338, p. 3. (March 8, 2017). (Italics added)

⁷ “Robocalls are phone calls with prerecorded messages.” See [https:// www.verizon.com /support /consumer/consumer-education/robocalls](https://www.verizon.com/support/consumer/consumer-education/robocalls), Accessed March 21, 2017.

⁸ See, e.g., *Manuel v. NRA Group, LLC*, 2016 WL 4158797 (Aug. 5, 2016); *Estrella v. LTD Fin. Servs., LP*, No. 8:14-cv-2624-T-27AEP, 2015 WL 6742062 (M.D. Fla. Nov. 2, 2015); *Gaza v. LTD Fin. Servs., LP*, No. 8:14-cv-1012-T-30JSS, 2015 WL 5009741 (M.D. Fla. Aug. 24, 2015); *Bates v. Dollar Loan Center, LLC*, 2014 WL 60472 (D. Nev. Jan. 7, 2014); *Nelson v. Santander Consumer USA, Inc.*, 2013 WL 1141009, at *3 (W.D. Wis. March 8, 2013); *Ploch v. FirstSource Advantage, LLC*, 2012 WL 5384876, at *4 (E.D. Mo. Nov. 1, 2012); *Dobbin v. Wells Fargo Auto Finance, Inc.*, 2011 WL 2446566 (N.D. Ill. Jun. 14, 2012); *Mudgett v. Navy Federal Credit Union*, 2012 WL 870758 (E.D. Wis. Mar. 13, 2012).

This is particularly relevant to the mortgage servicing industry. Perhaps uniquely, mortgage servicers are subject to many regulations that require that they make contact with their borrowers, oftentimes through outbound telephone calls. These requirements were promulgated by federal regulators with relevant jurisdiction who came to the conclusion that early contact with borrowers was one of the best ways to address mortgage delinquencies. This is illustrated by data that demonstrates the length of mortgage delinquency is one of the most relevant factors to whether a borrower can perform on a loan modification and remain in their home.⁹ As the Commission is aware, the Federal Housing Finance Agency placed so much importance on these calls that it called for an exemption from the *current* prior express consent regime for them.¹⁰ The MBA agrees with FHFA on the need for this exemption and the importance of avoiding foreclosures given the associated harms it can cause consumers and communities.¹¹ Accordingly, MBA filed a Petition for Exemption and subsequent Application for Review to facilitate these communications between mortgage servicers and borrowers.

If this petition were to be granted, it would make it even more difficult for mortgage servicers to comply with an already onerous TCPA regime that implicates the live contact calls necessary for mortgage servicers to meet their regulatory obligations.¹² This result harms borrowers, their communities, and our national economy – a result that was not intended by the TCPA and that does not support any public policy goal. Suggesting that mortgage servicers can comply with these outbound call requirements by placing manually dialed calls is neither realistic nor a desirable outcome for consumers. Absent using a rotary telephone, mortgage servicers have no comfort that their calls are outside the scope of the TCPA, even when a human initiates the call or when all ten digits of a telephone number are dialed.¹³

Even if there were welcome and necessary certainty as to what constitutes a manually dialed call, requiring limited telephone equipment and functionality impedes these critical communications and creates additional compliance exposure, such as misdialed numbers, controls on the timing and frequency of telephone calls, and the inability to monitor and record telephone calls, among others. It is simply not realistic to require a mortgage servicing employee to enter each ten digit telephone number to reach the millions of mortgage borrowers they are required to

⁹ Only the amount of payment reduction provided by the modification was more significant the length of the pre-modification delinquency. Scott, Walter. “Treatment Effects of Subprime Mortgage Modifications Under the Home Affordable Modification Program.” Page 28, March 2015

¹⁰ Comment Letter of the Federal Housing Finance Agency to the Proposed Regulation Implementing the Bipartisan Budget Act of 2015, at p. 2 (June 6, 2016) (emphasis added).

¹¹ “The financial losses associated with foreclosure are substantial. For homeowners, credit ratings are damaged, which affects their ability to move on to a new home and lessens their ability to get loans for other purchases. Poor credit ratings may also negatively influence terms and prices for services such as insurance and may impede efforts to get jobs, because some employers access credit ratings for new hires. The net worth for homeowners in foreclosure decreases, since they lose their home as an asset along with any accumulated equity and the tax advantages of homeownership. In the mid-1990s, the Family Housing Fund in Minneapolis estimated the average family lost \$7,200 through foreclosure. Current estimates are most likely higher, as figures are adjusted for inflation and recent decreases in housing values further erode equity and negate previous financial investments in the foreclosed home. One observer noted, ‘foreclosure can wipe out the homeowners’ savings and leave them owing debt on homes they no longer own.’” G. Thomas Kingsley, Robin Smith, and David Price, Urban Institute, “The Impact of Foreclosures on Families and Communities.” May 2009, pg. 14 (citations omitted).

¹² We note the importance of mortgage servicing calls to consumers and the need for an exemption for these calls in MBA’s pending Application for Review before the Commission, filed December 15, 2016.

¹³ See Supra Note 8.

call each day just to avoid liability under the TCPA. Layering on an additional consent requirement does not support the purpose of the Act, nor does it protect privacy interests or otherwise advance consumer interests. Indeed, MBA is hopeful that the Commission will seek to ease these burdens rather than impose additional ones.

In sum, these calls are often placed due to regulations that require contact with delinquent borrowers in order to offer assistance to avoid foreclosure. These calls concern what is likely the single largest asset owned by the consumer, the loss of which would be devastating. Imposing additional hurdles on these communications, particularly on preferred communication methods like text messaging, after numerous Commission rulemakings have declined to do so, is unwarranted and unwise. The Commission should reject Petitioners' request.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Pete Mills", with a stylized, cursive script.

Pete Mills,
Senior Vice President
Residential Policy and Member Services
Mortgage Bankers Association